IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Plaintiff, v. ENRON CORPORATION, ANDREW S. FASTOW, KENNETH L. LAY and JEFFREY J. SKILLING, Defendants.	Civil Action No. 01-CV-3624 (Consolidated) Judge Melinda Harmon

MEMORANDUM OF LAW OF THE FLORIDA STATE BOARD OF ADMINISTRATION AND THE NEW YORK CITY PENSION FUNDS IN FURTHER SUPPORT OF THEIR MOTION FOR APPOINTMENT AS CO-LEAD PLAINTIFFS AND IN OPPOSITION TO OTHER LEAD PLAINTIFF APPLICATIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

The Florida State Board of Administration (the "FSBA") and the New York City Pension Funds (the "NYC Funds") (sometimes collectively referred to as "the Funds"), two of the largest public pension funds in the United States, have joined together to seek appointment as co-lead plaintiffs in this historic consolidated federal securities fraud litigation against Enron Corporation ("Enron"), its senior officers, directors and auditors, and possibly, others.[1] The FSBA and the NYC Funds unquestionably have the largest financial interest in the relief sought by the class and satisfy the pertinent requirements of Rule 23 of the Federal Rules of Civil Procedure. The FSBA and the NYC Funds are thus presumptively the most adequate plaintiffs to direct this litigation. 15 U.S.C. §78u-4(a)(3)(B)(ii). See In re Waste Management, Inc. Sec. Litig., 128 F. Supp. 2d 401, 413 (S.D. Tex. 2000) ("Waste Management").

This litigation arises from one of the most stunning corporate collapses in United States history. Enron, with a market capitalization of approximately $70 billion as recently as last February, has filed the largest bankruptcy petition in American financial history. Investors in Enron securities have lost tens of billions of dollars. Thousands of Enron employees have lost their jobs and their life savings. Enron senior officers have pocketed hundreds of millions of dollars while artificially inflating Enron's earnings by concealing Enron's liabilities through off-the-books dealings with partnerships they operated. Arthur Andersen LLP ("Andersen"), Enron's supposedly independent auditors, had a financial relationship with Enron management that compromised Andersen's independent judgment, knowingly certified false financial

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[1] On January 14, 2002, the FSBA and the NYC Funds filed an Amended Motion seeking appointment as co-lead plaintiffs and approving their selection of co-lead counsel, together with an application seeking, inter alia, an order preventing Arthur Andersen from destroying additional documents.

statements, and destroyed thousands of documents relating to its work at Enron. Six Congressional committees, a U.S. Department of Justice task force, and the Securities and Exchange Commission are conducting investigations.

Litigation that seeks to remedy wrongs of this magnitude must be led by responsible parties with the highest integrity, experience and qualifications, as well as the commitment to ensure that all injured class members obtain the greatest recovery possible. The FSBA and the NYC Funds, among all of the parties seeking appointment as lead plaintiff, are best able to meet this challenge. They engender all of the attributes that the Fifth Circuit and this Court require of lead plaintiffs in securities class actions brought under the Private Securities Litigation Reform Act ("PSLRA"). See Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001), reh'g denied en banc, No. 00-20875, 2002 U.S. App. LEXIS 579 (5th Cir. Jan 14, 2002); Waste Management, 128 F. Supp. 2d at 411-432. The FSBA and the NYC Funds possess the experience, cohesiveness and sophistication that this Court and this litigation will inevitably demand. See Compaq, 2002 U.S. App. LEXIS 579, at *1 (the PSLRA "direct[s] courts to appoint, as lead plaintiff, the most sophisticated investor available and willing so to serve in a putative securities class action").

This Court will also require the lead plaintiffs in this action to "monitor the litigation to prevent its being 'lawyer-driven.'" Waste Management, 128 F. Supp. 2d at 411-12. See also Compaq, 257 F.3d at 481 (the PSLRA mandates that "class representatives, and not lawyers, must direct and control the litigation"). The FSBA and the NYC Funds have formally sworn:

- their full commitment to manage and direct the prosecution of this case together;
- their shared proven experience in litigating securities class actions;
- their ability and willingness to dedicate their appreciable in-house legal and

investment professionals to serve the interests of the class members in this litigation;

- their shared belief that the clients must control this litigation; and
- their negotiations with counsel to achieve a retainer agreement and a fee arrangement designed to maximize the Funds' supervision and control of this litigation and to maximize the recovery of the Class.[2]

As soon as they agreed to seek appointment as Co-Lead Plaintiffs, the FSBA and the NYC Funds demonstrated their desire to take an active role in this action by simultaneously filing their joint Motion for a Temporary Restraining Order Prohibiting Arthur Andersen From Destroying Evidence and A Limited Lifting of the Discovery Stay on January 14, 2002, which the Court is scheduled to hear on January 22, 2002.

The FSBA and the NYC Funds are the only applicants with substantial experience in leading a complex federal securities fraud litigation of this scope and magnitude. They both have the expertise and resources necessary to actively supervise the conduct of this litigation.[3] The NYC Funds were a co-lead plaintiff in the massive Cendant securities litigation that resulted in a record-breaking settlement of $3.2 billion for defrauded investors. In addition, the NYC Funds in Cendant obtained clarification by the Third Circuit of the rights and obligations of lead plaintiffs under the PSLRA, as well as the appropriateness of auctions to select counsel and set

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[2] See Affidavit of Linda Lettera dated January 11, 2002 (the "Lettera Aff.") and Declaration of Leslie A. Conason dated January 14, 2002 (the "Conason Decl."), which are annexed to the Amended Motion of the Florida State Board of Administration and The New York City Pension Funds for Appointment of Co-Lead Plaintiffs and Co-Lead Counsel. The Lettera Aff. and the Conason Decl. testify to the significant thought, analysis, and discussions that resulted in the FSBA and NYC Funds' agreement to seek to serve as Co-Lead Plaintiffs.

[3] Lettera Aff. at ¶ 6; Conason Decl. at ¶¶ 11-12.

fees. These efforts of the NYC Funds will create a benefit to the Cendant class of at least $76 million. The FSBA has prosecuted shareholder class actions resulting in both substantial settlements and significant corporate governance remedies, including recovering $162 million for investors in a complex case involving Dollar General Corporation, and achieving a significant recovery and corporate governance changes in the UCAR litigation.[4]

In addition, the Funds share the common goal of maximizing the net recovery not only to their employees and retirees, but to all class members. The FSBA and the NYC Funds have selected experienced and respected counsel to lead this litigation through a thoughtful and competitive process. After hard arm's length bargaining, they have negotiated a retainer agreement with these counsel which they believe to be unusually favorable to class members – potentially saving them many millions of dollars, while still providing their attorneys with sufficient incentive to obtain the best possible recovery for the class.[5] Moreover, the monitoring provisions in the retainer agreement that the FSBA and the NYC Funds negotiated with their selected counsel, which provides for constant client oversight, were expressly drafted to prevent any duplication of effort among their proposed co-lead counsel. See Waste Management, 128 F. Supp. 2d at 423 (noting the importance of minimizing duplication while recognizing the potential benefits of firms' combined resources).

None of the other movants can match the qualifications of the FSBA and the NYC Funds – largest financial interest, substantive experience as lead plaintiff, demonstrated commitment to

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[4] In contrast, the Georgia, Ohio, Washington, and California Regents funds have never served as a lead plaintiff in a securities class action.

[5] The FSBA and the NYC Funds will submit their fee retainer to the Court for its in camera review, if the Court so desires. The FSBA and the NYC Funds believe that this agreement provides for fees at materially lower levels than those governing the other lead plaintiff applicants.

controlling the actions of lead counsel to ensure that the litigation is conducted in the best interests of the Class, internal resources, the process through which counsel was selected, and a highly beneficial fee retainer. Indeed, no other group which has sought appointment as a lead plaintiff has provided the Court with any information as to how or why those groups were formed, what roles each member intends to play in the case, and how the group selected and retained its chosen counsel. All of the foregoing attributes demonstrate that the FSBA and the NYC Funds are best equipped to serve as fiduciaries to the Class. Accordingly, the FSBA and the NYC Funds respectfully request that the Court appoint them as co-lead plaintiffs.[6]

The Competing Lead Plaintiff Motions

The financial interests claimed in the motions filed by the various groups seeking appointment as lead plaintiff are summarized in the following tables:

TABLE I

Applicants Seeking Appointment as Lead Plaintiff For Entire Action

Applicant	Losses
FSBA/NYC Funds	$443.9 million

[6] Although on both a quantitative and qualitative basis, the FSBA and the NYC Funds are the most adequate plaintiffs and should be appointed as co-lead plaintiffs, they recognize the significance of this extraordinary case to the public pension fund community. Accordingly, the FSBA and the NYC Funds invite the other public fund applicants (i.e., the pension funds of Georgia, Ohio, Washington, and Alabama, and the University of California Regents) to serve as members of a public pension fund committee to monitor the progress of this litigation. Subject to an appropriate confidentiality agreement, the FSBA and the NYC Funds, as co-lead plaintiffs, would periodically provide the members of this committee with status reports and consult with the committee on issues concerning the conduct of the litigation.

State Retirement Systems Group	$330.7 million[7]
Enron Institutional Investor Group	$242 million
Private Asset Management	$10.3 million
Local 710 Pension Fund	$2.5 million
The Davidson Group[8]	$133,043

TABLE II

Applicants Seeking Appointment As Lead Plaintiff
for Selected Subclasses (the "Niche Applicants")

Applicant	Subclass	Losses
Staro Asset Management	Enron Bonds	$38 million
JMG/TQA Group	Enron Debt Securities	$5.1 million
Pulsifer & Associates	Enron 7% Notes	$1 million
Archdiocese of Milwaukee	Enron Debt Securities	$77,000
Preferred Purchaser[9] Lead Plaintiffs	Enron Preferred Stock	$189,264

The motions filed by the State Retirement Systems Group (the "State Group"), the Enron Institutional Investor Group, Private Asset Management, and Local 710 Pension Fund, seeking appointment as Lead Plaintiff for the entire litigation, are premised on the erroneous assumption

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[7] This figure includes losses of $47.7 million of the Retirement Systems of Alabama, an "advisory plaintiff" to the group. There is no provision in the PSLRA for an advisory plaintiff, and Alabama's losses should, therefore, not be included in the group's total. See discussion, infra.

[8] The Davidson Group, which is comprised of individual investors, argues that "it is entirely appropriate for individual investors to have a voice in any lead plaintiff structure." However, this type of lead plaintiff structure is contrary to the express provisions and purpose of the PSLRA. See Point VI, infra.

[9] The Preferred Purchaser Lead Plaintiffs also oppose consolidation of their claims with those of common shareholders.

that they each possess a larger financial interest in this case than the other movants. However, both the FSBA individually, and the FSBA and NYC Funds collectively, have a much larger financial interest in this litigation than any other applicants.[10]

Each of the Niche Applicants argues that separate lead plaintiffs and lead counsel should be appointed for proposed subclasses, including purchasers of Enron bonds, Enron debt offerings, Enron 7% Notes, and Enron Preferred Stock. The Niche Applicants contend that the various proposed subclasses need separate and distinct lead plaintiffs because of the alleged competing and conflicting interests between class members who purchased Enron common stock and class members in the various proposed subclasses.[11] The issue before the Court, however, is neither whether subclasses are warranted, nor whether separate lead plaintiffs and counsel should be appointed for the alleged subclasses. Rather, as the PSLRA expressly provides, "the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions," and not a separate class or subclass. 15 U.S.C. § 78u-4(a)(3)(B)(ii). There is no statutory authority to support appointing a lead plaintiff of a proposed subclass at such an early stage of the litigation. See Waste Management, 128 F. Supp. 2d at 432 (noting that conflicts alleged by proposed options subclass were premature at lead plaintiff stage of the litigation).

Moreover, there is no need to appoint subclasses. All of the claims against defendants arise out of the same alleged misconduct, namely, Enron's dissemination of materially false financial statements from October 1998 through November 2001, which resulted from deliberate

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[10] The FSBA lost more than $325 million on its class period investments in Enron common stock, and more than $9 million from its class period investments in Enron bonds.

[11] FSBA and the NYC Funds collectively lost more than $35 million from their purchases of Enron bonds during the relevant period, in addition to common stock losses of more than $408 million.

accounting improprieties at the highest levels of senior management. The Niche Applicants' speculations "about possible conflicts do not rebut the statutory presumption that one lead plaintiff can vigorously pursue all available causes of action against all possible defendants under all available legal theories." Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1151 (N.D. Cal. 1999) (emphasis in original). Thus, the argument that subclasses should be created, each with a different lead plaintiff and lead counsel, should be rejected as premature and unwarranted.

ARGUMENT

I. THE FSBA AND THE NYC FUNDS ARE THE "MOST ADEQUATE PLAINTIFFS"

Under the PSLRA, the "most adequate plaintiff" is the "person or group of persons" which has the "largest financial interest in the relief sought by the class" and who otherwise facially satisfies the typicality and adequacy requirements of Fed. R. Civ. P. 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

As an initial matter, the FSBA and the NYC Funds have "the largest financial interest in the relief sought by the class" of the eleven applicants seeking appointment as lead plaintiff. As demonstrated above, the FSBA is the investor with the single largest loss and the FSBA and the NYC Funds together have suffered a much greater loss than any other movant.

Next, there can be little dispute that the FSBA and the NYC Funds are both typical and adequate representatives of the class of Enron investors. Both the FSBA's and the NYC Funds' claims arise out of the same conduct and are based upon the same legal theories as are the claims of all other investors. Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997). All

investors charge that defendants engaged in a massive accounting fraud and caused Enron to issue materially false and misleading financial statements throughout the October 1998 through November 2001 class period. Stock, bond and note prices were all artificially inflated as a result. The claims of all investors are thus similar. Id.

In the Fifth Circuit's recent decision in Berger v. Compaq Computer Corp., 257 F.3d at 482, the Court held that the adequacy requirement, as clarified by the PSLRA, requires "that securities class actions be managed by active, able class representatives who are informed and can demonstrate that they are directing the litigation." Here, it cannot be disputed that the FSBA and the NYC Funds have not only distinguished themselves as active, able class representatives in major securities class actions in the past, but also have established themselves as responsible leaders in this litigation by retaining highly qualified class counsel at a fee and with retainer terms which confer a unique advantage to the Class. In addition, the Funds are actively monitoring this litigation through almost daily discussions with their counsel, are reviewing pleadings prior to filing, and are involved in all major decisions concerning the litigation, from communications with the press to authorization of their attorneys' time and expense commitments. See Lettera Aff. and Conason Decl.

Since the FSBA and the NYC Funds have "the largest financial interest in the relief sought by the class" and preliminarily satisfy the typicality and adequacy requirements of Fed. R. Civ. P. 23, they enjoy the statutory presumption of being the "most adequate plaintiff." Under the statute, competing movants may rebut the presumption only with "proof" that the FSBA and the NYC Funds are neither typical nor adequate. 78u-4(a)(3)(B)(iii)(II)(a); Waste Management, 128 F. Supp. 2d at 410-12; Gluck v. Cellstar Corp., 976 F. Supp. 542, 543-45 (N.D. Tex. 1997). The FSBA and the NYC Funds believe that no competing movant will be able to rebut the

PSLRA's presumption favoring the Funds' appointment as co-lead plaintiffs.

II. NEITHER THE STATE GROUP NOR THE ENRON INSTITUTIONAL INVESTOR GROUP IS THE MOST ADEQUATE PLAINTIFF

A. Neither the State Group Nor the Enron Institutional Investor Group Has the Largest Financial Interest in the Relief Sought by the Class

Neither the State Group[12] nor the Enron Institutional Investor Group[13] is the most adequate plaintiff because neither group is the "group of persons that . . . has the largest financial interest in the relief sought by the class . . .." See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). The State Group claims to have lost $330.7 million. The Enron Institutional Investor Group claims to have lost $242 million. By contrast, the FSBA and NYC Funds collectively suffered losses of $443.9 million, $113.2 more than the State Group, and $201.9 million more than the Enron Institutional Investor Group. Thus, the FSBA and NYC Funds have the "largest financial interest in the relief sought by the class," see id., thereby establishing that the State Group and the Enron Institutional Investor Group are not entitled to the statutory presumption as most adequate plaintiff. See In re MicroStrategy Inc. Sec. Litig., 110 F. Supp. 2d 427, 436 (E.D. Va. 2000) (rejecting proposed lead plaintiff whose losses were far exceeded by losses of other applicants); In re E.spire Communications., Inc. Sec. Litig., Civil No. H-00-1140, 2000 U.S. Dist. LEXIS 19517, at *16 (D. Md. Aug. 15, 2000) (same).

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[12] The State Group is comprised of: (1) the Teachers Retirement System of Georgia ("TRSG"); (2) the Employees' Retirement System of Georgia ("ERSG") (TRSG and ERSG are collectively referred to by the State Group as "Georgia"); (3) the Teachers Retirement System of Ohio ("TRSO"); (4) the Employees Retirement System of Ohio ("ERSO") (TRSO and ERSO are collectively referred to by the State Group as "Ohio"); (5) the Washington State Investment Board ("Washington"); and (6) the Retirement Systems of Alabama ("Alabama").

[13] The Enron Institutional Investor Group is composed of Amalgamated Bank, the Regents of the University of California, Deutsche Asset Management, HBK Investments, and the Central States Pension Fund.

B. The State Group Improperly Includes Losses of the Retirement Systems of Alabama, Even Though That Entity Does Not Seek Lead Plaintiff Status

The State Group includes in its $330.7 million loss figure the losses purportedly suffered by the Retirement Systems of Alabama ("Alabama"). However, Alabama does not seek to be appointed as a lead plaintiff in this litigation, but instead requests that it be appointed as a so-called "Advisory Plaintiff." State Mem. at 1-2.[14] Alabama's losses should be excluded in evaluating the total losses suffered by the State Group. See In re Ribozyme Pharm, Inc. Sec. Litig., 192 F.R.D. 656, 659 (D. Colo. 2000) ("[W]hen determining which group has the largest financial interest, courts may only look to the losses sustained by the class members actually being put forward by any particular group to act as lead plaintiffs.") Thus, excluding Alabama's $47.7 million in losses from consideration of the largest financial interest, the State Group's losses are actually $283 million, or $162 million less than those suffered by the Funds.

Tellingly absent from the State Group's submissions is any explanation of what an "Advisory Plaintiff" is, how it is permissible under the PSLRA, and why such an undefined role actually furthers the interests of the Class in the effective and efficient prosecution of the case. The plain language of the PSLRA requires prosecution of securities litigation by a "lead plaintiff" and nothing less. 15 U.S.C. § 78u-4(a)(3)(B)(i). The reasons for this requirement are sound. The lead plaintiff owes fiduciary duties to the Class. Including an "advisory plaintiff" in the lead plaintiff group runs afoul of the PSLRA, which requires appointment of an "investor available and willing to . . . serve" as lead plaintiff. Berger v. Compaq, 2002 U.S. App. LEXIS

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[14] The PSLRA requires that persons seeking appointment as lead plaintiff must make a motion for such appointment within 60 days of the commencement of the action. 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). By failing to file a motion seeking appointment as a lead plaintiff within the statutory period, Alabama is now precluded from acting as a lead plaintiff.

579, at *1. See also In re Critical Path, Inc. Sec. Litig., 156 F. Supp. 2d 1102, 1112 (N.D. Cal. 2001); Greebel v. FTP Software, Inc., 939 F. Supp. 57, 63-64 (D. Mass. 1996) (quoting 1995 U.S.C.C.A.N. at 690). The effective prosecution of complex securities class action litigation demands that such fiduciaries engage themselves directly in the action. This direct involvement is required because the lead plaintiff must vigorously prosecute the action against the defendants. See Berger v. Compaq Computer Corp., 257 F.3d at 483 (PSLRA requires "that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation"); In re Baan Co. Sec. Litig., 186 F.R.D. 214, 220 (D.D.C. 1999) ("The lead plaintiff should actively represent the class.") (quoting Report on the Private Securities Litigation Reform Act of 1995, S. Rep. No. 104-98, 10 (1995)); In re E.spire, 2000 U.S. Dist. LEXIS 19517, at *13 (lead plaintiff must "vigorously prosecute the pending actions against the defendants").

The instant litigation will be complex and time-consuming, requiring close attention to rapidly developing facts and circumstances. Many decisions must be made throughout the course of the litigation and they must be made by the entities who have demonstrated an unwavering and complete commitment to obtain the best result for the Class. Including as part of the lead plaintiff structure any person or entity with anything less than the full commitment required by the PSLRA would hinder the effective prosecution of the case by diluting the control over case management. See In re Lucent Techs. Inc. Sec. Litig., 194 F.R.D. 137, 154 (D.N.J. 2000) (recognizing importance of avoiding dilution of lead plaintiff's control).

The State Group's "Advisory Plaintiff" proposition raises many questions. Among others, how often will Alabama advise? On what issues will Alabama advise? Will Alabama's approval be required as part of the State Group's decision-making process? If Alabama is

committed to the advancement of the litigation, why does it request a diminished role in its prosecution? What fiduciary obligations will Alabama -- as an Advisory Plaintiff -- have to the Class? Alabama's limited involvement will dilute the control Congress intended to vest in the lead plaintiff. Accordingly, Alabama should not be appointed to act as an "Advisory Plaintiff."

C. Neither the State Group Nor the Enron Institutional Investor Group Is An Appropriate "Group" Within the Meaning of the PSLRA

Aside from lacking the largest financial interest in the litigation, neither the State Group nor the Enron Institutional Investor Group is the type of "group" contemplated by Congress under the PSLRA and endorsed by this Court in Waste Management.[15] While District Courts interpreting the PSLRA have allowed groups of investors to act together as lead plaintiffs, the permissibility of such an organizational structure is limited to instances where the group demonstrates the ability to work together effectively.

This Court has recognized that a group of proposed lead plaintiffs must establish the "cohesiveness" of such group. Waste Management, 128 F. Supp. 2d at 413. Cohesiveness ensures that those investors at the center of the litigation are able to work together in a manner that promotes sound and timely decisions regarding the conduct of the litigation. See In re Lernout & Hauspie Sec. Litig., 138 F. Supp. 2d 39, 43-45 (D. Mass. 2001) (group should be "cohesive" or otherwise effectively coordinated for effective litigation prosecution); Local 144

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[15] In Waste Management, this Court cited an amicus brief which the SEC had filed in Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246 (E.D. Va. 1999), as follows: "The Commission believes that ordinarily, in order to ensure adequate stakes, monitoring, coordination and accountability, such a group should be no more than three to five persons, and the fewer the better." 128 F. Supp. 2d at 413. (Emphasis added.) Here, the State group, as proffered, consists of at least four members, while the Enron Institutional Investor Group has five members. By contrast, the FSBA/NYC Funds group represents an equal partnership of two qualified public pension funds.

Nursing Home Pension Fund v. Honeywell Int'l Inc., Civ. No. 00-3605 (DRD), 2000 U.S. Dist. LEXIS 16712, at *12-14 (D.N.J. Nov. 16, 2000) (approving group whose members demonstrated preparation and ability to manage litigation effectively).

In analyzing the cohesiveness of a proposed group under the PSLRA, District Courts consider certain factors, including the members' background and experience relating to the lead plaintiff responsibilities, the manner in which the group was formed, and an explanation of how its members will function effectively together. See In re Lernout & Hauspie, 138 F. Supp. 2d at 44-45; Local 144 Nursing Home, 2000 U.S. Dist. LEXIS 16712, at *13-14; In re MicroStrategy, 110 F. Supp. 2d at 434-35; see also Waste Management, 128 F. Supp. 2d at 413 (requiring more from proposed group than statement of names and transactions in securities). The burden is on the proposed group to establish its cohesiveness. Waste Management, 128 F. Supp. 2d at 413.

Neither the State Group nor the Enron Institutional Investor Group has even attempted to satisfy this burden. The submissions of these groups are completely silent on how the various entities within the respective groups came together and how they plan to work together to prosecute this litigation. Nor do the submissions of these groups describe the extent to which synergies exist among their respective members which make them effective and efficient representatives of the Class. For example, while stating an intention to "actively monitor" the litigation, the affidavits filed by Ohio do not address how Ohio, Georgia and Washington have coordinated their efforts to monitor and control this litigation effectively.[16] Similarly, not one of

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[16] Details concerning the formation of the State Group are entirely absent. Notably, the Declaration and Certification of Stephen H. Huber on Behalf of TRSO (the "Huber Declaration") dated December 20, 2001, states that TRSO "believes that it, along with the Public Employees Retirement System of Ohio, the State Teachers Retirement of Georgia and the Public Employees Retirement System of Georgia, is the largest class member . . .." Based upon the foregoing language of the Huber Declaration, it appears that the Ohio Funds were ignorant of the fact that it was seeking to be appointed Lead Plaintiff with Washington, as well as Alabama's

the certifications of the Enron Institutional Investor Group's constituents even tangentially addresses how the group was formed, or how any of the group's members intend to monitor, direct, and control this litigation. Instead, the Enron Institutional Investor Group appears to be "too unconnected to anything other than their loss and their counsel to serve the purposes of the PSLRA Lead Plaintiff." Waste Management, 128 F. Supp. 2d at 431. See also In re Critical Path Sec. Litig., 156 F. Supp. 2d at 1111 (rejecting proffered group because members' only connection is their counsel.)

In contrast, the FSBA and the NYC Funds have affirmatively demonstrated their cohesiveness, and both the FSBA and the NYC Funds have demonstrated a commitment to actively manage the prosecution of this case. The sworn statements of Linda Lettera, on behalf of the FSBA, and Leslie A. Conason, on behalf of the NYC Funds, detail the significant thought, analysis and discussions that culminated in the Funds' decision to serve as co-lead plaintiffs in this action. The Funds' submissions establish that the FSBA and the NYC Funds share a public policy commitment and responsibility to absent Class members in this case, and intend to be actively involved in its prosecution. Ms. Lettera and Ms. Conason detail that the Funds carefully selected and retained counsel to represent them in this lawsuit and negotiated a competitive fee agreement which provides for proper incentive for class counsel to achieve the best result for the Class while avoiding the possibility of windfall compensation. Both public pension funds have the experience, capability and resources to devote to pursuing the greatest recovery possible for

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proposed role as an "Advisory Plaintiff." The Declaration of Laurie F. Hacking on Behalf of the Public Employees Retirement System of Ohio, dated December 21, 2001 – the deadline for filing Lead Plaintiff motions in this litigation – also omits any reference to Washington or Alabama. The sworn declarations of the members of the State Group indicate that the Group's members were unaware of their prospective partners even as of the date that the Group's attorneys filed the Group's motion.

all injured Class members.

As a result of the Funds' close coordination and considerable experience, demonstrable synergies flow from the joint prosecution of this case by the FSBA and the NYC Funds. Indeed, the FSBA and the NYC Funds comprise precisely the sort of group which meets the standards for appointment as lead plaintiffs under the PSLRA. As a result, this Court should appoint the FSBA and NYC Funds to act as co-lead plaintiffs on behalf of the Class. See Berger v. Compaq, 2002 U.S. App. LEXIS 579; Waste Management, 128 F. Supp. 2d at 242.

III. THE INCLUSION OF DEUTSCHE ASSET MANAGEMENT AS A MEMBER OF THE ENRON INSTITUTIONAL INVESTOR GROUP PRECLUDES THAT GROUP FROM SERVING AS A LEAD PLAINTIFF

A. Deutsche Asset Management Has A Disabling Conflict of Interest

Deutsche Asset Management, which claims to have lost approximately $61,000,000 in connection with its Class Period transactions in Enron stock, is the asset management division of Deutsche Bank. See Exhibit A hereto.[17] Deutsche Bank is one of the leading international financial service providers. Among the investment banking services that Deutsche Bank provides is underwriting loans and/or debt securities for corporations. During the Class Period, Deutsche Bank was one of several investment banking firms that underwrote syndicated loans for Enron and its affiliates. See The Wall Street Journal article dated January 14, 2002, annexed as Exhibit B. It appears that the loans that Deutsche Bank underwrote provided debt financing for certain of Enron's many purported Special Purpose Entities ("SPEs") that are at the heart of

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[17] In their moving papers, the Enron Institutional Investor Group appears to miscalculate Deutsche Asset Management's losses. Deutsche Asset's class period expenditures on Enron common stock are represented to be $126,772,212.90. However, the actual amount expended appears to be $109,514,232.19.

this litigation. In exchange for underwriting certain components of Enron's debt, Deutsche Bank was one of several investment banking firms that appear to have received at least $214 million in fees. See Exhibit B.

The foregoing indicates that it is reasonably foreseeable that the interests of the Class will require the lead plaintiff to seek discovery from Deutsche Bank, and to consider seriously the possibility of naming Deutsche Bank as a defendant in this action. Deutsche Asset Management cannot be expected to take these actions against its parent. This conflict, therefore, prevents Deutsche Asset Management from serving as a Lead Plaintiff in this litigation. Because Deutsche Asset Management possesses interests that are clearly antagonistic to the interests of the Class, the Enron Institutional Investor Group, which includes Deutsche Asset Management, cannot serve as Lead Plaintiff in this litigation. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986). See also Berger v. Compaq, 2002 U.S. App. LEXIS 579, at *1 (lead plaintiff should be capable of controlling the litigation).

B. Deutsche Asset Management Has Not Otherwise Demonstrated Its Adequacy to Represent the Class

In contrast to the detailed sworn statements submitted by the representatives of the FSBA and the NYC Funds, Deutsche Asset Management has submitted two bare-bones declarations which merely parrot the language of the PSLRA, providing absolutely no indication of what steps Deutsche Asset Management has taken to ensure that this action will be client-driven. In its declarations, which were executed in Frankfurt, Germany, Deutsche Asset Management (a German company) also has provided no explanation of how it intends to oversee a litigation conducted in a federal court in the United States, where the vast majority of the members of the

Class will be American citizens, and the claims being prosecuted are claims under the U.S. securities laws. See, e.g., In re Network Associates Sec. Litig., 76 F. Supp. 2d 1017, 1030 (N.D. Cal. 1999) (rejecting proposed foreign lead plaintiff, noting that "the distances involved and some differences in business culture would impede their ability to manage and to control American lawyers conducting litigation in California.").

Finally, Deutsche Asset Management has filed two different certifications in support of its claimed damages arising out of trading in Enron securities. One certification apparently was signed on behalf of Deutsche Asset Management. The other certification states that Deutsche Asset Management is "acting as agent on behalf of our clients." The losses reflected on the second certification cannot be counted toward Deutsche Asset Management's claimed losses for purposes of determining the most appropriate lead plaintiff. No evidence has been submitted as to the identities of the clients who allegedly purchased the securities reflected on the certification. Nor has any evidence been provided regarding what authority – if any – Deutsche Asset Management has to commence litigation on behalf of these unidentified clients. Deutsche Asset Management has failed to submit any evidence to enable the Court and the parties to answer the following crucial questions:

- Does Deutsche Asset Management have discretionary authority to commence litigation on behalf of every one of these clients?

- If not, did Deutsche Asset Management obtain specific authorization to commence this action on behalf of every one of these clients?

Deutsche Asset Management's certifications fail to furnish the information the Court needs to determine whether Deutsche Asset Management in fact has discretionary or actual authority to commence litigation on behalf of its unidentified clients. The losses allegedly sustained by these

unidentified clients, therefore, cannot be considered on this motion.

IV. THE EXPERIENCE OF THE FSBA AND THE NYC FUNDS AS LEAD PLAINTIFFS IN SECURITIES LITIGATION FURTHER QUALIFIES THEM TO SERVE AS LEAD PLAINTIFFS

The NYC Funds and the FSBA have demonstrated that when they serve as lead plaintiffs they actively manage the litigation and serve the classes they represent well by obtaining substantial relief and maximizing the recovery to the Class. Combined they have the resources and experience to manage litigation of this magnitude.

Some movants may argue that the FSBA cannot be appointed lead plaintiff here since it has served as a lead plaintiff in more than five securities fraud cases in three years. See 15 U.S.C. § 78u-4(a)(3)(B)(vi).[18] In this case, however, the experience and resources of the NYC Funds and the FSBA advance the purposes of the PSLRA, and the Court should use the authority granted it under the PSLRA to waive the five-in-three limit.

The legislative history of the statute and the Conference Report that accompanied the statute make clear that Congress intended for institutions to exceed the five-in-three rule in appropriate cases. The PSLRA "Professional Plaintiffs" provision was specifically addressed by Congress in the Conference Report, which states:

> The Conference Report seeks to restrict professional plaintiffs from serving as lead plaintiffs by limiting a person from serving in that capacity more than five times in three years. Institutional Investors seeking to serve as lead plaintiff may need to exceed this limitation

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[18] This provision, entitled "Restrictions on Professional Plaintiffs," states:

> Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff . . . in no more than 5 securities class actions brought as plaintiff class actions pursuant to Federal Rules of Civil Procedure during any 3-year period. (Emphasis added.)

> and do not represent the type of professional plaintiff this legislation seeks to restrict. As a result, the Conference Committee grants courts discretion to avoid the unintended consequence of disqualifying institutional investors from serving more than five times in three years. The Conference Committee does not intend for this provision to operate at cross-purposes with the "most adequate plaintiff" provision.

H.R. Conf. Rep. 104-369, 104th Cong., at 35 (1995).[19] (Emphasis added.)

A court "must exercise its discretion consistent with the Congressional purpose underlying [the] statute." Hall v. Hall, 738 F.2d 718, 720 (6th Cir. 1984) (citation omitted). Further, such an exercise of a statutory grant of discretion will be reviewed against the backdrop of "the purpose of the statutory provision applied." Casey v. City of Cabool, Missouri, 12 F.3d 799, 805 (8th Cir. 1993). Accordingly, courts have rejected the notion that the "professional plaintiff" provision bars the FSBA from serving as a lead plaintiff and, "consistent with the purposes" of the PSLRA have appointed the FSBA lead plaintiff or co-lead plaintiff because it is "precisely the sort of lead plaintiff envisioned by the [Private Securities Litigation Reform] Act." Naiditch v. Applied Micro Circuits Corp., 01-CV-0649K, 2001 U.S. Dist. LEXIS 21374, at *6 (S.D. Cal. Nov. 2, 2001). See also In re Critical Path, 156 F. Supp. 2d at 1112 (appointing FSBA lead plaintiff); Piven v. Sykes Enterprises, Inc., 137 F. Supp. 2d 1295,1305 (M.D. Fla. 2000)[20] (appointing FSBA co-lead plaintiff and holding that institutional investors that are "in the

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[19] Courts have noted that the Conference Report for the PSLRA represents "the most reliable evidence of Congressional intent." In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 977 (9th Cir. 1999); In re Network Associates, Inc. Sec. Litig., 76 F. Supp. 2d at 1030 (citing Silicon Graphics).

[20] Aug. 25, 2000 Report and Recommendation and Sept. 14, 2000, Order Adopting such Report, reported at 2000 U.S. Dist. LEXIS 20983 and 2000 U.S. Dist. LEXIS 20986, respectively.

business of security investments" and are not the type of "professional plaintiff" Congress had in mind when it created the presumptive bar against repeat plaintiffs).[21] See also Network Associates, 76 F. Supp. 2d at 1030-31(appointing the Board of Pensions and Retirement of the City of Philadelphia lead plaintiff and noting, "the Conference Report, however, made clear that an institutional investor like the Board may be granted special leave to serve beyond the [five case] limit").[22]

In the very recent Micro Circuits opinion, the court specifically found that:

> Appointing FSBA as lead plaintiff would be entirely "consistent with the purposes of this section." FSBA is an experienced institutional investor, managing over $105 billion in assets, with fiduciary obligations to safeguard the interests of its public funds. As such, it is particularly well situated to control the litigation.
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> * * *
>
> [P]rosecuting securities litigation is part of what FSBA does to fulfill its fiduciary duties to look after the public money in its care. FSBA has a general counsel and corporate counsel department which can oversee and control the litigation. For such a large institutional investor, 11 appointments as lead plaintiff is quite understandable, and in fact could evince a laudatory zeal to fulfill its fiduciary duties. Such experience will well equip FSBA to oversee this litigation. The court therefore appoints FSBA as lead plaintiff.

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[21] The Sykes opinions were published following a letter request by the Securities and Exchange Commission's Deputy Solicitor suggesting, at a minimum, the SEC's concurrence with that view.

[22] The FSBA is aware of two cases (In re Telxon Sec. Litig., 67 F. Supp. 2d 803 (N.D. Ohio 1999) and Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146 (N.D. Cal. 1999)), where courts denied appointment as lead plaintiff under the five case limit rule. The opinions cited above, which post-date Telxon and McKesson, more accurately reflect the current state of the law on the five case limit rule, as well as the intent of Congress in enacting that provision.

2001 U.S. Dist. LEXIS 21374, at *8 (emphasis omitted). The principles that guided the court's decision in Micro Circuits are equally applicable here. The magnitude of the fraud and complexity of this litigation confirm that the experience of the FSBA and the NYC Funds in prosecuting investor class actions will benefit the Class. Rather than barring them from serving as lead plaintiffs, the experience of the FSBA and the NYC Funds as lead plaintiffs in the prosecution of these cases, and the Funds' successful resolution of such actions, argue strongly in favor of the Funds' appointment as lead plaintiffs in a case of this significance.[23] The FSBA's and NYC Funds' pro-active approach to managing shareholder class actions as true fiduciaries to the class is precisely what Congress intended in enacting the PSLRA. The results obtained by both the FSBA and the NYC Funds in similar litigations are demonstrative of what Congress intended for institutional investors to achieve for shareholders in securities litigation. The FSBA and the NYC Funds have the resources and experience needed to manage a case of this magnitude.

V. SEPARATE LEAD PLAINTIFFS SHOULD NOT BE APPOINTED FOR CLAIMS OF PROPOSED SUBCLASSES

Prior to assignment of this action to this Court, Judge Rosenthal consolidated all securities cases into one action, all derivative claims into another, and all ERISA claims into a third. The Niche Applicants here seek to carve this case up yet again: they seek four additional separate lawsuits – one for common stock purchasers, one for bond purchasers, one for preferred

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[23] In both the In re UCAR Int'l, Inc. Sec. Litig., Case No. 98-CV-0600-JBA, District of Connecticut, and the In re Samsonite Corp. Sec. Litig., Case No. 98-K-1878, District of Colorado, settlements in which the FSBA was a lead plaintiff, not only were significant monetary recoveries obtained, but corporate governance relief was obtained designed to cure the problems that lead to the litigation in the first place.

stock purchasers, and one for note purchasers.

Creating new lawsuits or establishing subclasses is entirely unnecessary and will unquestionably lead to inconsistent proceedings and costly duplication of effort and a tremendous drain on, and waste of, this Court's resources, as well as the financial resources of the defendants to remedy the massive injuries to the Class. More fundamental is the fact that further fragmentation will create additional layers of plaintiffs' lawyers who will drain away in legal fees money that could otherwise be recovered for investors. In light of Enron's bankruptcy and the massive losses sustained in this action, this practical consideration alone should result in the denial of the request to carve up the securities class action four different ways.

A. The PSLRA Mandates Appointment Of One Lead Plaintiff For The Entire Action

The requests to appoint a separate lead plaintiff for each particular Enron security referenced in the various complaints or motions in these related actions are contrary to the provisions of the PSLRA. The structure suggested by the Niche Applicants would be inefficient and unnecessarily complicated, and would not advance the interests of the various class members. The FSBA and the NYC Funds indisputably have substantial financial interests in the relief sought by the class. Indeed, the FSBA and the NYC Funds lost substantial amounts from investing in both Enron common stock and Enron bonds. There is no reason to believe that the claims of any class member will not be championed.

Furthermore, the language of the PSLRA undeniably demonstrates that, even where different claims are asserted, Congress intended to have one lead plaintiff appointed for all claims brought in a consolidated action:

> If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination [of lead plaintiff] until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court should appoint the most adequate lead plaintiff for the consolidated actions in accordance with this subparagraph.

15 U.S.C. § 78u-4 (a)(3)(B)(ii); 77z-1(a)(3)(B)(ii) (emphasis added). Thus, the PSLRA requires the court first to consolidate all the related claims, and then to appoint a lead plaintiff for the consolidated actions. Judge Rosenthal has already consolidated the securities claims into one action – Newby. To appoint a different lead plaintiff for each claim would contradict the clear language of the statute as well as common sense, especially where, as here, all the claims are based upon the same underlying events. See In re Cendant Corp. Litig., 182 F.R.D. 144, 148 (D.N.J. 1998) ("notwithstanding every plaintiff's undeniable interest in an outcome most favorable to his or her position, every warrior in this battle cannot be a general").

In Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d at 1150-51, the court was confronted with virtually the same circumstances. Numerous lead plaintiff applicants argued that a separate lead plaintiff was required for various niches, i.e., different legal claims or different securities. The court, in rejecting these applications, explained the relevant procedures under the PSLRA:

> The "niche" plaintiffs' arguments do not fully take into account that the Reform Act establishes a procedure for the court's speedy consolidation of all pending claims. Under the Act, a member of the purported plaintiff class who wishes to challenge the appointment of a presumptively most adequate plaintiff must present proof that the presumptively most adequate plaintiff either (i) will not fairly and adequately protect the interests of the class or (ii) is subject to unique defenses that render that plaintiff incapable

> of adequately representing the class. See 15 U.S.C.A. § 78u-4(a)(3)(B)(iii)(II) (West 1997). The "niche" plaintiffs have not met their statutory burden. Their speculations about possible conflicts do not rebut the statutory presumption that one lead plaintiff can vigorously pursue all available causes of action against all possible defendants under all available legal theories.

Id., at 1151 (footnotes omitted; emphasis added).

The reasoning expressed above applies equally here. At this early stage of the litigation, assuming that the "most adequate plaintiff" would not represent the interests of all Enron securities is mere speculation.

B. There Is No Basis To Appoint Separate Lead Plaintiffs For Purchasers of Different Enron Securities

The push for appointment of separate lead plaintiffs makes even less sense in light of the fact that all of the consolidated actions involve common questions of law and fact and arise from the same operative claims under the federal securities laws on behalf of investors in Enron securities during substantially overlapping time periods. As alleged, and as will be shown at trial, Enron common stock, preferred stock, bond and note purchasers paid artificially inflated prices for their securities at the time of purchase due to defendants' material misrepresentations and omissions throughout the relevant time frame. All of these purchasers of Enron securities were damaged in a like manner by defendants' conduct. Their interests, at least at this stage of the litigation, are aligned by the common goal of establishing defendants' misrepresentations and omissions to the market. Indeed, in her Order of Consolidation dated December 12, 2001, Judge Rosenthal stated as follows:

> These cases all arise from a common core of operative facts. They are filed against common defendants. Many of the cases contain identical claims. The legal issues will overlap.

> Much of the discovery will be common to all the cases.

Order at 17. There is no reason to believe that any potentially diverging interests could not later be accommodated, if necessary, within the framework of the unified leadership of the FSBA and the NYC Funds.

Several district courts, including this one, have already directly addressed this issue of appointing representative parties on behalf of purchasers of different types of securities or claimants and have decided the question in accordance with the positions of the FSBA and the NYC Funds.

In Waste Management, this Court approved consolidation of related pending securities class actions without appointing a separate lead plaintiff to represent a proposed option sub-class:

> This Court also concludes that at this time the appointment of a Lead Plaintiff for an options subclass, especially one represented by several law firms, does not appear necessary and therefore it denies Korsinsky's motion. Should conflicts arise subsequently, the Court will entertain another motion from Korsinsky or other class members who have purchased or sold Waste Management options during the class period that specifically addresses the issue.

Waste Management., 128 F. Supp. 2d at 432.

Similarly, in In re MicroStrategy, Inc. Securities Litigation 110 F. Supp. 2d at 431-32, 440, the court held:

> There are also differences among the various different suits with respect to the class period and parties. . . . Yet, none of these minor differences detract from the overwhelming factual and legal similarities among the cases. . . Finally, it is equally apparent that consolidation would significantly enhance judicial economy.
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> * * *
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> Moreover, the record at that point suggested that the claims of option-holders and stockholders are in most cases sufficiently similar that they should be consolidated "in form and in fact," and

> thus litigated by the same lead plaintiff and lead counsel. . . . In any event, even assuming proper class certification required a separate subclass of option-holders, the PSLRA requires a district court to appoint a single lead plaintiff or lead plaintiff group for each class action; there is no provision for multiple lead plaintiffs other than those joined as a group. . . . To the extent a subclass or classes represented by separate counsel are required for the proper administration of this litigation and representation of the members of the class, that issue may be addressed at a later stage pursuant to Rule 23, Fed. R. Civ. P.

Id. (emphasis added); See also Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d at 1151-52.

Even assuming arguendo that there may be differences among the claims of purchasers of the various Enron securities, there is no requirement that the claims of all plaintiffs and class members be identical for those persons to be certified as part of a single class. See In re Lucent Techs., Inc. Secs. Litig., 194 F.R.D. at 150 (internal citations and quotation marks omitted) ("Rule 23(a)(3) does not require the claims of the Proposed Lead Plaintiffs to be identical to those of the class. Rather, the typicality requirement is satisfied when the plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other members and is based on the same legal theory"); see also Sanders v. Robinson Humphrey/ American Express, Inc., 634 F. Supp. 1048, 1057 (N.D. Ga. 1986) ("[w]hen plaintiffs have alleged such a common course of conduct, courts consistently have found no bar to class certification even though members of a class may have purchased different types of securities or interests, or purchased similar securities at different times").

Courts have repeatedly held that stock purchasers can represent purchasers of debt instruments – and vice versa – simultaneously in the same action. See Endo v. Albertine, 147 F.R.D. 164, 167 (N.D. Ill. 1993) ("a class of plaintiffs who purchased different types of securities may properly be certified with a representative party who only purchased one type of security");

In re Saxon Sec. Litig., [1983-84 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,691, at 99,779 (S.D.N.Y. Feb. 23, 1984) ("debenture holders have an interest identical to that of the holders of common stock in demonstrating a common course of fraudulent conduct and in implicating defendants in that conduct"); Epstein v. Moore, [1988-89 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,957, at 90,443 (D.N.J. June 3, 1988) (same); Handwerger v. Ginsberg, [1974-75 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,934, at 97,240 (S.D.N.Y. Jan. 2, 1975)(in a securities class action lawsuit, court held that since there was no substantial differences between debenture holders and stock holders – both were seeking to recover damages as a result of misrepresentations – the plaintiff, debenture holder, can represent both a class of debenture holders and stock holders); Deutschman v. Beneficial Corp., 132 F.R.D. 359, 368-75 (D. Del. 1990) (purchasers of call options may also represent stock purchasers); Clark v. Cameron-Brown Co., 72 F.R.D. 48, 53 (M.D.N.C. 1976) (holder of common stock could also represent warrant holders).

It has also been held that purchasers of common stock may adequately represent purchasers of preferred stock where, as here, claims arise from a common course of conduct. In re Atlantic Financial Federal Securities Litigation, No. 89-0645, 1990 U.S. Dist. LEXIS 15965 (E.D. Pa. Nov. 26,1990) (common stock and preferred stock certified in same class- the difference between preferred stock and common stock does not "overshadow the common issues").

Finally, the determination of Lead Plaintiff is not the decision on class certification. The determination of whether the Lead Plaintiff will fairly and adequately represent the interests of class members is, at this stage, merely a preliminary determination subject to review at the actual class certification stage. See In re Nice Sys. Sec. Litig., 188 F.R.D. 206, 217 (D.N.J. 1999) ("A wide-ranging analysis under Rule 23 is not appropriate [at this initial stage of the litigation] and

should be left for consideration of a motion for class certification" (quoting Fischler v. AMSouth Bancorp., No. 96-1567-CIV-T-17A, 1997 WL 118429, at *2 (M.D. Fla. Feb. 6, 1997))). See also Gluck v. CellStar Corp., 976 F. Supp. at 546 ("Evidence regarding the requirements of Rule 23 will, of course, be heard in full at the class certification hearing. There is no need to require anything more than a preliminary showing at this stage"). It is for this additional reason that courts deciding Lead Plaintiff motions under the PSLRA have generally refused to subdivide classes or appoint separate leaderships based on alleged intraclass differences or conflicts. See, e.g., MicroStrategy, 110 F. Supp. 2d at 431-32, 440; In re Cendant Corp. Litig., 182 F.R.D. at 478 ("All the actions consolidated by this Court are based on securities fraud claims that arise from a common course of conduct. The dates on which the misrepresentations occurred do not change their nature"); In re Olsten Corp. Sec. Litig., 3 F. Supp. 2d 286, 293 (E.D.N.Y. 1998) (consolidating securities fraud class action cases even though the class periods were slightly different).

C. The Enron Bankruptcy Does Not Require Separate Lead Plaintiffs for Holders of Different Securities

The argument of the Niche Applicants that Enron's bankruptcy requires the appointment of separate lead plaintiffs for the purchasers of the various Enron securities because of different priorities, preferred status or secured interests in the bankruptcy proceedings is unavailing. As a result of the bankruptcy, Enron will no longer be a party to this action. The relative priority of different Enron securities in making claims against the bankrupt Enron has no bearing on the various securities purchasers' claims for violations of the federal securities laws in this litigation. Rather, as the Niche Applicants themselves admit, the relative priority or preference status of

Enron's various securities holders will be determined in Enron's bankruptcy proceeding.

The federal securities law claims in this litigation will be prosecuted against the individual defendants, defendant Arthur Andersen, and others. The securities laws allow for the prosecution of claims against these parties, independent of Enron:

> [P]roceedings like the present may go forward without the participation of the corporation. To hold otherwise would allow the Bankruptcy Act to create a sizable loophole through which malfeasant corporate officers and directors and their insurers could escape, at least temporarily, all civil prosecutions of their individual fraudulent acts by having the corporation file a bankruptcy petition. We cannot agree that the protections afforded by the Bankruptcy Act were intended to be so all-encompassing as to shield such non-debtor third parties.

Duval v. Gleason, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,694, at 98,260 (N.D. Cal. Oct. 19, 1990). The Enron bankruptcy is and should remain separate and distinct from this litigation in order to allow all of Enron's securities purchasers an efficient means to adjudicate their claims and seek a recovery.[24]

The bankruptcy court will parse out all of the liquidation, dividend and other contractual priorities of any type of Enron security, debt instrument and obligation with respect to the bankrupt corporation. The claims of Enron securities purchasers in this litigation will not be determined based on the contractual or liquidation priorities that will be considered in Enron's bankruptcy proceedings. The distinctions between classes of securities in bankruptcy

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[24] Significantly, neither the individual defendants nor Arthur Andersen are in bankruptcy and none of these defendants' assets or any insurance coverage for these defendants belong to the bankrupt's estate. See, e.g., Houston v. Edgeworth, 993 F.2d 51,56 (5th Cir. 1993)("insurance proceeds . . . are not property of the estate."); In re Louisiana World Expositions, Inc., 832 F.2d 1391, 1399-1401 (5th Cir. 1987) (ownership of an insurance policy does not "inexorably lead to ownership of the proceeds" and insurance proceeds that "belong only to directors and officers, are not part of the estate.")

proceedings relied upon by the Niche Applicants, therefore, are not relevant to the claims in this litigation. There is, therefore, no rationale for appointing separate counsel in this litigation for any purchaser group which may also have separate claims to be addressed in the bankruptcy proceedings.

VI. THE DAVIDSON GROUP'S SUGGESTION OF A LEAD PLAINTIFF STRUCTURE WHICH INCLUDES INDIVIDUAL INVESTORS SHOULD BE REJECTED

The Davidson Group maintains that "it is entirely appropriate for individual investors to have a voice in any lead plaintiff structure," thus inviting this Court to appoint members of the Davidson Group as co-lead plaintiffs with the FSBA and the NYC Funds. However, such a structure would run contrary to the express provisions and purpose of the PSLRA.

In Gluck v. CellStar, 976 F. Supp. at 549-550, the court rejected the type of co-lead plaintiff structure proposed by the Davidson Group, and refused to appoint an individual to serve as a co-lead plaintiff with an institutional investor which had a larger financial interest. The Gluck court noted that appointing an individual as a co-lead plaintiff with an institutional investor would frustrate "one of the principal goals of the PSLRA," which is to vest control of securities litigation "with large investors" like the FSBA and the NYC Funds. See also Waste Management, 128 F. Supp. 2d at 414-15 (observing the preference in the PSLRA for institutional investors). The co-lead plaintiff structure proposed by the Davidson Group would also "detract from the [PSLRA's] fundamental goal of client control." Id. Accord In re Advanced Tissue Sciences Sec. Litig., 184 F.R.D. 346, 351 (S.D. Cal. 1998) (the "proposal – that the Court appoint co-lead plaintiffs and co-lead counsel from both moving groups – is without solid legal precedent. . . [and] in tension with the PSLRA's goal of minimizing lawyer-driven litigation.")

See also In re Milestone Scientific Sec. Litig., 183 F.R.D. 404, 417 (D.N.J. 1998).[25]

CONCLUSION

The FSBA and the NYC Funds have proven experience in leading, directing, and successfully resolving the very type of complex securities litigation now before this Court. Their sworn dedication to work tenaciously and cooperatively to obtain the greatest possible recovery for the Class compels the conclusion that they are the most adequate plaintiffs under both the PSLRA and the law of this circuit. See Berger v.Compaq, 2002 U.S. App. LEXIS 579, at *1. As a result, the FSBA and the NYC Funds respectfully request that this Court appoint them as co-lead plaintiffs, and further request that this Court appoint their selected attorneys as co-lead counsel, to prosecute this significant litigation on behalf of the Class.

Dated: January 21, 2002

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[25] The Davidson Group's reliance on In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42 (S.D.N.Y. 1998) is misplaced. In Oxford, the court appointed an institutional investor as co-lead plaintiff with two other competing plaintiffs that had suffered smaller losses. The Oxford court noted that "the lead plaintiff decision must be made on a case-by-case basis, taking account of the unique circumstances of each case" (Id. at 49), and was apparently concerned with whether the institution with the largest loss and its counsel could effectively prosecute the action. The court decided to employ "a tri-partite lead plaintiff structure with each of the three lead plaintiffs exercising one equal vote." Id., at 47. Here, FSBA and the NYC Funds are independent entities represented by qualified and experienced law firms. Thus, the court's concern in Oxford is not relevant here.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the F.R.C.P., I hereby certify that a true and correct copy of the above and foregoing document was served on all known counsel of record by First Class, United States mail and/or facsimile, on this the 22nd day of January 2002, see attached service list

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EXHIBIT A

Deutsche Asset Management

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EXHIBIT B

January 14, 2002

Deals & Deal Makers

How Wall Street Greased Enron's Money Machine

By JOHN R. EMSHWILLER, ANITA RAGHAVAN and JATHON SAPSFORD
Staff Reporters of THE WALL STREET JOURNAL

In March 1995, **Enron** Corp. executive Andrew Fastow approached Philip Pool, a banker at Donaldson, Lufkin & Jenrette Inc. with a tantalizing offer.

As an official of a prized DLJ corporate client, Mr. Fastow wanted DLJ's help to raise money for a partnership the Houston energy company was putting together. The partnership, Mr. Fastow said, would help Enron by buying assets from the company and keeping debt off its balance sheet. Too much balance-sheet debt would lower Enron's credit rating and hinder growth.

But the proposal had an unusual feature. While remaining an Enron official, Mr. Fastow would head the independent partnership, which would have outside investors and do business with Enron. DLJ said no. "There are too many conflicts here," Mr. Pool told Mr. Fastow, according to people familiar with the conversation.

A spokesman for Mr. Fastow confirmed that the 1995 meeting took place. But he said that by 1999 DLJ was expressing interest in doing private placement work for a similar partnership, known as LJM2 Co-Investment LP, which would eventually do hundreds of millions of dollars of business with Enron. Mr. Fastow, who by 1999 was Enron's chief financial officer, ran LJM2 and was a part owner until he severed ties with it last summer.

Mr. Pool, who is no longer with DLJ, says he talked with Enron in 1999 but says the private fund group that he co-headed decided that the conflict-of-interest concern was still too great. A spokesman for Credit Suisse First Boston, which acquired DLJ in 2000, declined to comment.

In the end, **Merrill Lynch** & Co., the nation's largest securities firm, took on the task of helping to market LJM2. Merrill committed $22 million from the firm and its officials to the partnership as part of helping to raise nearly $400 million from more than three dozen institutional and individual investors, according to partnership records.

A gaggle of other financial firms joined Merrill in investing in LJM2, apparently in hopes of further cultivating ties with Enron, which at the time was one of Wall Street's hottest clients. **J.P. Morgan Chase**, **Citigroup** Inc., Credit Suisse First Boston, **Wachovia** Corp. and others poured between $10 million and $25 million into the Enron partnership. A DLJ-related limited partnership even kicked in $5 million.

A Merrill spokesman says "we believe that our relatively limited dealings with Enron and our involvement with LJM2 were entirely proper. We believe the potential conflicts involved in LJM2 were fully disclosed to partnership investors."

Representatives for J.P. Morgan, Citigroup and Wachovia declined to comment on the investments.

The upshot: Some of the world's leading banks and brokerage firms provided Enron with crucial help in creating the intricate -- and, in crucial ways, misleading -- financial structure that fueled the energy trader's impressive rise but ultimately led to its spectacular downfall. Indeed, without the financial grease from Wall Street, Enron wouldn't have grown into the nation's biggest energy trader and seventh-biggest company. In return, Wall Street firms earned hundreds of millions of dollars in fees -- $214 million in underwriting alone, and much more in lending, derivatives trading and merger advice.

Now the banks are scrambling to recover what they can in the wake of Enron's bankruptcy filing, the largest in U.S. history, last month. The debts include $4 billion in loans and billions of dollars more in other obligations owed to banks, which could erase at least some of the considerable profits financial institutions made in financing Enron on the way up. When all is said and done, the question that ultimately will be raised is: Did the banks lower their

lending standards to get all the other business from Enron. The banks vehemently say no.

"Enron was a cash cow for the banks," says Frank Partnoy, a former Morgan Stanley derivatives salesman who wrote a book on Wall Street's high-pressure sales tactics. "You can't do sophisticated limited partnerships and credit derivatives without the participation of the major banks." Mr. Partnoy, now a professor at the University of San Diego School of Law, likens the role of banks in the Enron debacle to a "casino claiming hardship when a high roller playing on credit can't pay his marker. It's difficult to feel too sorry for the banks trying to recover debts owed by Enron, given that the same banks set up the game and were intimately involved in the Enron partnerships."

Enron's demise already has produced dozens of shareholder lawsuits. The deep involvement -- and deep pockets -- of big banks and Wall Street firms raises the possibility that they will get sucked into the litigation maelstrom.

Wall Street's role in the Enron saga throws the spotlight on the 1999 repeal of Depression-era legislation called the Glass-Steagall Act. The law was meant to separate the business of lending from underwriting, largely because many blamed the financial turmoil of 1929, and the depression that followed, on speculation in the stock market by the nation's banks, which also are supposed to be the guardians of deposits.

Bankers lobbied successfully for Glass-Steagall's repeal in hopes of creating huge financial supermarkets such as Citigroup and J.P. Morgan. These institutions now can offer credit cards and loans alongside mutual funds. On the corporate side, they can lend and arrange credit lines while also filling out such financings with other lucrative services once limited to investment banks, such as stock or bond offerings or mergers advisory.

Enron's decline shows how these multi-faceted institutions are often on many sides of big deals in arrangements bristling with potential conflicts. Consider the many hats worn by J.P. Morgan as one of Enron's main lenders. (J.P. Morgan says its lending exposure to Enron is more than $2.6 billion.) It has arranged billions of dollars in loans to Enron, keeping chunks of that financing on its own books. It also has underwritten bonds for Enron.

Less visible are other roles. J.P. Morgan trades currencies, bonds and derivative contracts, both with Enron and with other institutions that trade the debts and obligations issued by Enron. It has a research analyst covering Enron who until last fall had recommended investors buy Enron stock. J.P. Morgan also sold Enron credit derivatives, among other things, even as its asset-management arm managed a stock fund for the Employee Retirement System of Texas that held Enron stock. (The Enron stock was liquidated from the portfolio at the end of November, a spokeswoman for the Texas system says -- more than a month after Enron's troubles were well known.)

A spokeswoman at J.P. Morgan says the asset-management arm is likely to join some of the shareholder suits against Enron even though teams from other areas of the bank were advising Enron on the same decisions that are now being called into question by lawsuits.

J.P. Morgan officials say they have strict "Chinese walls" separating these businesses to keep conflicts from compromising the bank's activities. But "it's very difficult to keep the Chinese walls in place," says David Hendler, an analyst at CreditSights, a debt market research firm.

J.P. Morgan says its many ties to Enron reflect diversification into a slew of different business lines that insulate it from the risks of lending. Such diversification reduces risk to the financial system as a whole, the bank argues, a view shared by the many big institutions with ties to Enron. And Enron's failure has yet to show any sign of bringing down a major financial institution.

Meanwhile, J.P. Morgan already is suing one of Enron's other big lenders, Citigroup, in New York federal court. The suit alleges that a group of insurers, including a Citigroup unit, are improperly refusing to pay about $1 billion on surety-bond policies for Enron-related oil and natural gas delivery contracts.

Doing Deals With Enron

Some of the investment banks that were underwriters, agents and/or advisers for Enron, 1999-2001

Investment bank	Stocks & convertibles	Debt	Syndicated loans	Mergers & acquisitions
Citibank/Salomon Smith Barney	4	-	4	4
J.P. Morgan Chase	-	-	4	4
Credit Suisse First Boston	4	4	4	4
BNP-Paribas	-	4	4	
Deutsche Bank	-	-	4	
Merrill Lynch & Co.	4	4	-	4
Goldman Sachs Group	4	-	-	4
Banc of America Securities	4	4	-	4
Lehman Brothers		4	-	4

Source: Thomson Financial

In court papers, St. Paul Fire & Marine Insurance Co. says it can't find evidence of actual oil and gas deliveries and contends the entire arrangement was designed to obtain guarantees for J.P. Morgan on loans to Enron "in the guise" of insuring product-supply contracts. J.P. Morgan denies that allegation. Citigroup declines to comment, citing pending litigation.

It wasn't long ago that Enron was among the ripest of Wall Street's plum clients. It had a voracious appetite for capital and was constantly pioneering new businesses trading everything from electricity futures to hedges against bad weather. Its online trading operation, called EnronOnline, handled nearly $1 trillion in transactions in the two years following its November 1999 opening.

Enron expected lots of help from Wall Street as it hacked out new trails in the wilderness of commerce. None of its exploits were wilder than the private partnerships run by company executives. While many big businesses had long done business with outside partnerships as a way to keep debt off the books, none had ever set up a structure like the one Enron created. For one thing, the partnerships seemed designed to make some Enron officials far more money working part time on the partnerships than they did working full time for Enron. The company recently estimated that Mr. Fastow -- whom Enron replaced as chief financial officer last October as controversy around him mounted -- made more than $30 million since 1999 running LJM2 and a smaller partnership, called LJM Cayman LP.

Not all prospective investors were immediately dazzled by the ample returns being dangled by those pitching the LJM2 partnership. Miami-area businessman Eugene Conese recalls that when his Merrill broker first described the LJM2 partnership, "I said I thought there was a conflict of interest … that it didn't seem proper."

After assurances from Merrill and Enron officials that everything was proper, Mr. Conese relented. He committed $3 million personally and through a family partnership, LJM2 records show. Last year, after the surprise resignation in August of Enron President and Chief Executive Jeffrey Skilling, Mr. Conese tried to sell back his partnership interest and contacted LJM2, then being run by a former Enron executive and Fastow associate named Michael Kopper. LJM2 never acted on the request, says Mr. Conese. Recently, some of the limited partners hired a lawyer to explore their legal options in the face of a request by LJM2 management to put more money into the partnership.

Mr. Kopper has in the past declined to be interviewed. A call to LJM2's Houston office across the street from Enron headquarters was answered by a recording that said, "You've reached a nonworking number at Enron."

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